IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

FRIDAY, THE 22ND JUNE 2007 / 1ST ASHADHA 1929

CMA.No. 190 of 2001

AS.121/1995 of DISTRICT COURT, KOTTAYAM
OS.982/1989 of ADDL.M.C.,KOTTAYAM
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APPELLANTS/RESPONDENTS 3&4/PLAINTIFFS 3 &4:
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1. P.D. JOSEPH, S/O. THOMAS,
PARUMTHIRIRCKAL HOUSE,
ANICKADUKARA AND VILLAGE,
KOTTAYAM DISTRICT.

2. A.K.ABRAHAM, S/O.KURIAKOSE,
IKKARAMATTATHIL HOUSE,
-DO- -DO-

BY ADV. SRI.MATHEW JOHN (K)
SRI.BABY THOMAS

RESPONDENTS/ APPELLANTS AND R1 & 2 /DEFENDANTS AND PLAINTIFFS 1 &2 :
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1. RAMAN NAIR, PADMANABHAN NAIR,
KARINGAMATTATHIL HOUSE,
ANICKADU KARA AND VILLAGE,
KOTTAYAM.

2. KUTTYAMMA JANAKIAMMA,
W/O. PADMANABHAN NAIR,
-DO- -DO-

3. ACHAMMA THOMAS, W/O.THOMAS,
IKKARAMATTATHIL HOUSE,
ANICKADUKARA AND VILLAGE,
KOTTAYAM DISTRICT.

4. BINOY.K.THOMAS,
S/O.THOMAS,
IKKARAMATTATHIL HOUSE,
-DO- -DO-

BY ADV. SRI.T.R.HARIKUMAR FOR R1 AND R2

THIS CIVIL MISC. APPEAL HAVING BEEN FINALLY HEARD ON 22/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.PADMANABHAN NAIR, J.

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C.M.A. No. 190 OF 2001

Dated this the 22nd day of June, 2007

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JUDGMENT

The Civil Miscellaneous Appeal was admitted in the year 2001. At that time no substantial question of law was framed. During the pendency of this appeal, appellant filed I.A.816/07 seeking permission to amend the appeal memorandum by incorporating substantial question of law. That petition was allowed. The appeal was heard on the following substantial questions of law.

i) Is not the order of remand now passed by the District Court vitiated by illegality in so far as it has not taken into account the effect of the judgment, passed in O.S.No.380 of 1978 between the predecessor-in-interest of the present parties to the Appeal.

ii) Is not the remand order vitiated in not finding that the present suit is barred by doctrines of estoppal by judgment in the light of the judgment in O.S.No.380 of 1978 on the file of the Munsiff's Court, Kottayam.

iii) Is not the finding of the appellate court arrived at for the purpose of remanding the case opposed to the materials on record and therefore perverse and liable to be set aside.

2. The plaintiffs in O.S.982 of 1989 on the file of Additional Munsiff's Court, Kottayam are the appellants. The appellants filed a suit for decree of permanent prohibitory injunction. Plaintiffs purchased the suit properties in the year 1985 and 1989 and claimed that they were in absolute possession and enjoyment of the same. Dispute arose between plaintiffs and defendants in respect of the boundary of the property. A suit was filed by the defendants as O.S.380 of 1978 against the predecessor-in-interest of the plaintiffs. That suit was compromised on 18.6.1980 and a compromise decree was passed. It was averred that there is a fence demarcating the boundaries of the properties of the plaintiffs and that of the defendants. Apprehension of the plaintiffs was that the defendants are trying to tress pass into their properties after destroying the existing fence. Defendants filed a written statement and contended that there is no permanent fence is in existence. They claimed title and possession of 1.85 acres of

land. It was also contended that the first defendant purchased 75 cents of land under a sale deed which is shown as item No.2 in the written statement. It was contended that second defendant had mortgage right over the properties and those properties are lying as a compact plot. The allegation that the defendants tried to tress pass into the property of the plaintiffs after destroying the boundary is denied. The defendants filed a counter claim for declaration of their title and possession and for a decree of permanent prohibitory injunction against the plaintiffs. They also sought for a decree permitting them to put up a permanent boundary.

3. Trial court framed the following issues.

i) Whether the plaint schedule properties are demarcated from the defendants property by well defined boundaries?

ii) Is the prayer of the plaintiffs for injunction allowable?

iii) Whether the prayer of the defendants for declaration of title and possession over the property scheduled in the counter claim is allowable?

iv) Is the prayer of the defendants for injunction

allowable?

v) Whether the prayer of the defendants for fixation of boundary allowable?

vi) Reliefs and costs?

4. On the side of the plaintiffs, a commissioner was deputed who filed C1 report and C1(a) rough sketch. Defendants filed an application to appoint a commissioner at the fag end of the trial. That application was dismissed. So the properties were not identified and the boundary line fixed. The trial court took a view that the fence put up in pursuance to Ext.A1 decree was still in force and the defendants have no right to destroy the fence and tress pass into the suit property. Regarding the counter claim made by the respondents the trial court took a view that their property was not identified. So the counter claims were dismissed. Challenging the decree passed in the suit, respondents filed A.S.121/1995 before the District Court. The learned District Judge found that there is no permanent fence demarcating the boundary between the plaintiffs and defendants and the fence now existing is not strong and permanent. So the appellate court held that it is only just and proper to give another

opportunity to the defendants to get their property identified and allow them to put up a permanent boundary through the dividing line. So the decree and judgment passed by the trial court was set aside and case remanded. Challenging that judgment of remand this appeal is filed.

5. It is true that the defendants filed a suit against the predecessor-in-interest of the plaintiffs and the suit was compromised as evidence by Ext.A1 compromise decree. A fence was constructed on the dividing line. But no permanent boundary was constructed through that line. Subsequently, the predecessor-in-interest of the plaintiffs, Smt. Sosamma, filed Ext.P5 petition before the re-survey superintendent. The properties were measured and the superintendent of re-survey had passed an order to the effect that it is not necessary to change the boundaries fixed by the re-survey plan. That order was passed as early as on 15.6.1984. Even thereafter disputes are subsisting between the parties is clear. According to the plaintiffs, defendants are trying to tress pass in to their property. The case of the defendants was that the plaintiffs are trying to tress pass into their properties. This can only be settled

conclusively by getting the properties identified and the boundary line dividing the two properties fixed with the help of necessary records. The appellate court thought it fit to grant an opportunity to the respondents to get the boundary line fixed. Since there is no permanent boundary the appellate court gave an opportunity to the respondents to put up the boundary through the dividing line. It is not a case the appellate court allowed the respondents to adduce evidence to fill up the lacuna. The lower appellate court has not decided anything. An opportunity was given to both sides to adduce further evidence. Plaintiffs are also given an opportunity to get their property measured.

6. No substantial question of law arise in this appeal. There is no illegality or irregularity committed by the lower appellate court. The C.M.Appeal is only to be dismissed.

In the result, the appeal is dismissed. Parties shall appear the court below on 24.7.2007.

K.PADMANABHAN NAIR
JUDGE.

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